**IN THE SUPREME COURT OF THE STATE OF MONTANA**
Supreme Court Cause No. DA 16-0716

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Elaine Mitchell, and all others similarly situated,

Plaintiffs and Appellants,

-vs-

Glacier County, and State of Montana,

Defendants and Appellees.

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On Appeal for the FirstJudicial District Court, Lewis and Clark County
Cause No. ADV 2015-631
Honorable Mike Menahan

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# APPELLANTS' REPLY BRIEF

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## INTRODUCTION

In her opening brief, Plaintiff documented flagrant violations of accounting and budgeting laws by Glacier County. The law requires annual budgets as a prerequisite for property taxes, but the County has no budgets. The law requires balanced budgets, but the last report showed 29 County funds with $5.2 million in deficits. The County violates laws on investing in securities, on the treatment of cash, on accounting, and on audits. (App. Br., pp. 4-10)

Defendants trivialize these violations of law. They cite no countervailing evidence whatsoever. They answer the objective facts in Plaintiff's brief only with dismissive rhetoric.

The County depicts Plaintiff as a malcontent pursuing subjective policy disagreements with its officials. Thus, it asserts that she is "disgruntled," pursues "general grievances," and seeks to make the County "comply with [her] personal wishes" and do a "better job of governance." (County Br., pp. 17, 18, 21-22, 29-30) Nowhere does the County rebut the violations of law shown in Plaintiff's brief.

The State likewise makes no attempt to rebut the evidence of the County's malfeasance. Yet it insists that taxpayers suffer no "concrete injury" from that malfeasance – as if $5.2 million in deficit spending were some sort of airy abstraction! (See State's Br., pp. 4, 6, 17) And it claims absolute discretion not to

proceed against the County, despite the statutes expressly mandating that it take enforcement action. (See id., pp. 9-10)

The evidentiary basis for Plaintiff's claims is utterly unrebutted. The legal basis for those claims is squarely unrebutted as well. Defendants fail to distinguish the on-point case law cited by the Plaintiff.

This litigation poses large constitutional issues. One is the State's fiduciary duty to impose "strict accountability" on local governments. Another is separation of powers. The fundamental issue is whether courts have the authority to require State and County executives to comply with their legal duties.

Defendants expressly deny that authority. They contend that this Court cannot vindicate the Constitution against the most flagrant and unrebutted abuse. This Court should reject that contention and intervene, as it has in prior cases.

## ARGUMENT

## I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S CLAIMS.

### A. Justiciability: General Principles

In her opening brief, Plaintiff showed that the primary issue in this case is justiciability. The Defendants and the District Court wrongly treated issues of justiciability as strictly issues of standing. Plaintiff does have standing, but her claims should be upheld on broader grounds of justiciability as well.

The County frames this case as presenting non-justiciable political questions. It makes that argument quite expressly: "Such actions are reserved for the voting booth, and not as an alternative political tool." (County's Br., pp. 23, 30)

The State likewise argues that courts can't adjudicate the matters in issue here. It argues that Plaintiff's claims lack "legal bases," and that it possesses absolute, unreviewable discretion. (State's Br., pp. 32-34) It argues that "non-justiciable political questions" exist in the context here. (Id., p. 33)

As Plaintiff has shown, those arguments squarely are rebutted by *Columbia Falls Elementary School District v. State,* 2005 MT 69, ¶12, 326 Mont. 304, 109 P.3d 257. (App. Br., pp. 15-16) The County's Brief, however, does not even mention *Columbia Falls*! The State's Brief makes a perfunctory reference to the case, which is easily answered.

In *Columbia Falls*, this Court applied the Constitution's guarantee of "free quality public elementary and secondary schools." That guarantee is non-self-executing and therefore non-justiciable. But legislation applying it "addressed the threshold political question" and opened the way for broad judicial review. See id., ¶ 19.

*Columbia Falls* comprehensively addressed the merits of the "quality schools" issue. The Court reviewed exhaustive evidence concerning Montana

schools. Based upon that factual analysis, it held that the constitutional guarantee had not been met:

> The evidence that the current system is constitutionally deficient includes the following unchallenged findings made by the District Court: school districts increasingly budgeting at or near their maximum budget authority; growing accreditation problems; many qualified educators leaving the state to take advantage of higher salaries and benefits offered elsewhere; the cutting of programs; the deterioration of school buildings and inadequate funds for building repair and for new construction; and increased competition for general fund dollars between special and general education.
>
> * * *
>
> [W]hatever definition the Legislature devises, the current funding system is not grounded in principles of quality, and cannot be deemed constitutionally sufficient.

*Columbia Falls*, ¶¶ 29, 31 (emphasis added).

*Columbia Falls* establishes that (1) legislation implementing a non-self-executing constitutional clause makes the clause justiciable, and (2) thereafter, courts robustly can vindicate the constitutional guarantee. That precedent squarely governs here.

As in *Columbia Falls*, the unrebutted evidence shows that a constitutional guarantee has not been met. There has not been "strict accountability of all revenue received and money spent." (See Mont. Const., Art. VIII, § 12) And the State has failed to administer the laws that the legislature passed to implement this constitutional mandate. As in *Columbia Falls*, the issue is justiciable, and this

Court should robustly intervene.

The underlying principle here is separation of powers and checks-and-balances. *Columbia Falls* asserts this emphatically:

> [A]lthough the provision may be non-self-executing, thus requiring initial legislative action, the courts, as final interpreters of the Constitution, have the final "obligation to guard, enforce, and protect every right granted or secured by the Constitution …." [citation omitted]
>
> * * *
>
> In the case *sub judice*, the Legislature has addressed the threshold political question: it has executed Article X, Section 1(3), by creating a basic system of free public schools. As the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right. We conclude this issue is justiciable.

Id., ¶¶ 18, 19 (emphasis added).

The State attempts to distinguish *Columbia Falls* as follows. It contends that in *Columbia Falls*, plaintiffs challenged the legislation itself, whereas here Plaintiff challenges a failure to enforce the legislation. (State's Br., pp. 33-34) In essence, it argues that legislative action is justiciable, but that executive action is not.

That argument has no merit. Separation of powers requires the courts to scrutinize actions both of the Legislature (as in *Columbia Falls*) and of the Executive (as here). Justiciable constitutional values must be vindicated against abuses by either coordinate branch.

This Court very clearly has stated the principles at issue. Discussing "the basic constitutional notion of separation of powers," it stated the courts' responsibility as follows:

> [I]t is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution.

*In re License Revocation of Gildersleeve*, 283 Mont. 479, 942 P.2d 705, 708 (1997) (emphasis added), citing *Powell v. McCormack*, 395 U.S. 486, 506 (1969).

The courts, thus, clearly have authority to review executive action under the paradigm set out in *Columbia Falls*. Moreover, the legislation at issue (not just its enforcement) would be inadequate if the State's account were correct.

The State contends that the Single Audit Act (SAA) gives it absolute discretion to ignore egregious abuse. (See State's Br., pp. 12, 20-22, 29, 32, 38) Were this so, *Columbia Falls* would militate for holding that the SAA itself must be revised to vindicate the Constitution.

In sum, the issue here is justiciable. *Columbia Falls* controls the analysis. As in *Columbia Falls*, this Court robustly should intervene to remedy constitutional violations proven by unrebutted evidence.

**B. Justiciability: The State's Claim of Absolute Discretion**

As noted above, the State repeatedly claims that it has absolute discretion

whether or not to enforce the SAA. The State recites provisions stating that it "may" issue orders, "may" appoint auditors, "may" impose penalties, etc. (State's Br., pp. 20-22, 36) It argues, in boldface, that the law "**does not require**" it to act. (Id., pp. 21, 38)

In fact, as Plaintiff has shown, the SAA does require the State to act. It includes this mandatory provision:

> In cases where a violation of law or nonperformance of duty is found on the part of an officer, employee, or board, the officer, employee, or board must be proceeded against by the attorney general or county, city, or town attorney as provided by law. If a written request to do so is received from the department, the county, city, or town attorney shall report the proceedings instituted or to be instituted, relating to the violations of law and nonperformance of duty, to the department within 30 days after receiving the request. If the county, city, or town attorney fails or refuses to prosecute the case, the department may refer the case to the attorney general to prosecute the case at the expense of the local governmental entity.

§ 2-7-515(4), MCA (emphasis added). (App. Br., p. 9)

The State contends that the phrase "may refer" in the latter part of the statute overrides "must be proceeded against" in the first part. It argues: "This makes the State's decision to prosecute … discretionary." (State's Br., p. 9) That contention has no merit.

In construing a statute, this Court "must endeavor … to give effect to all the words used." *Trout Unlimited v. Montana Department of Natural Resources & Conservation*, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, ¶ 23; see § 1-2-101,

MCA ("in the construction of a statute … [w]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all"). Here, the statute's mandatory words must be given effect.

The statute's later permissive phrase ("may refer") grants discretion as to whether a local government should be charged with "the expense" of a proceeding. It cannot be read to give the attorney general discretion not to act when County attorneys fail to do so.

Another section of the SAA provides that local recalcitrance "shall result in the withholding of financial assistance in accordance with rules adopted by the department …" § 2-7-515(3), MCA (emphasis added). (App. Br., p. 9) The State asserts that it has made rules transforming the mandatory "shall" into a discretionary "may." (State's Br., pp. 8-9, 21-22) It argues that "Plaintiffs cannot sue to compel such discretionary acts." (Id., pp. 9, 38)

The Court should firmly reject this argument. The State cannot use rules to nullify a statutory command. The statute mandates action, and the State cannot claim discretion not to act.

This Court has long rejected claims of absolute, unreviewable discretion by executive officials. See, e.g., *Skaggs Drug Centers v. Montana Liquor Control Board*, 146 Mont. 115, 404 P.2d 511, 513-14 (1965) (rejecting claims that a government agency had "virtually an absolute discretion," "not reviewable

judicially"). Such claims should be rejected emphatically under the circumstances here.

As Plaintiff has pointed out, the duties of the government at issue here are fiduciary in nature. See *Carbon County v. Draper*, 84 Mont. 413, 276 P. 667, 669 (1929) ("Public moneys are but trust funds, and officers but trustees"). (App. Br., p. 12) The Defendants do not deny this. Claims of discretion by fiduciaries are scrutinized with rigor. See *In re Charles M. Blair Family Trust*, 2008 MT 144, 343 Mont. 138, 183 P.3d 61, ¶¶ 72-83 (rejecting claim of "unfettered or absolute discretion" by trustee).

In sum, the State's claim of absolute, unreviewable discretion has no merit. The law gives it mandatory duties. Separation-of-powers and checks-and-balances principles give this Court authority to order those duties fulfilled.

**C. Standing: Increased Tax Burden as "Injury"**

The parties to this appeal all recognize the baseline standing requirement imposed by the State Constitution. That baseline is "a past, present, or threatened injury to a property or civil right." *Hefferman v. Missoula County,* 2011 MT 91, 360 Mont. 207, 255 P.3d 80, ¶ 33. (See App. Br., p. 20; State Br., p. 15; County Br., p. 13)

In her opening brief, Plaintiff argued that this baseline is satisfied under *Helena Parents Commission v. Lewis and Clark County Commissioners,* 277

Mont. 367, 922 P.2d 1140 (1996). In *Helena Parents*, as here, plaintiffs claimed that a county's unlawful fiscal conduct would increase their property taxes. The Court agreed that this threatened injury to property rights conferred standing:

> Here, plaintiffs alleged that the government will impose tax burdens on them as it seeks to recoup losses and that the investments will result in a lessening of government services. These allegations of an economic injury satisfy the injury requirement.

Id., 922 P.2d at 1143 (emphasis added).

The County contends that in *Helena Parents* the taxpayers' injury was "concrete," whereas here it is only "hypothetical" or "theoretical." It dismissively states that "Plaintiffs **might** suffer additional property taxes." (County Br., pp. 11, 17, 19 (boldface by the County)). This is a groundless attempt at distinction.

In *Helena Parents*, as here, the increase in the tax burden was prospective ("the government will impose tax burdens"). *Helena Parents*, 922 P.2d at 1143. The situation was exactly parallel to the present case – the county illegally had incurred a deficit of more than $5 million. Id. at 1142. As here, the consequent threat of an increase in property taxes was self-evident.

The State contends that *Helena Parents* may give Plaintiff standing against the County, but not against the State itself. (State Br., p. 28) It argues that it did not commit "direct fiscal mismanagement," as the county did in *Helena Parents* and as Glacier County did here. (State Br., p. 28)

The State's contention has no merit. The State enabled the County's

mismanagement by not executing its duties. It thereby helped cause the Plaintiff's injury, and that injury is clearly sufficient to confer standing here.

*Helena Parents* is directly on point on its facts for the standing issue. Plaintiff has cited several other on-point standing cases as well. Chief among them is *Grossman v. State Dept. of Natural Resources,* 209 Mont. 427, 682 P.2d 1319 (1984). (App. Br., pp. 17-19)

*Grossman* expressly relaxes standing requirements in taxpayer cases. Id., 682 P.2d at 1325. It states:

> We will recognize the standing of a taxpayer, without more, to question the state constitutional validity of a tax or use of tax monies where the issue or issues presented directly affect the constitutional validity of the state or its political subdivisions acting to collect the tax, issue bonds, or use the proceeds thereof.

Id. (emphasis added).

The County makes no specific attempt to distinguish *Grossman*. It argues generically:

> Unlike **all** the cases cited by Plaintiffs, here, there is no objection to the validity of a tax or the use of tax monies by Glacier County.
>
> * * *
>
> The difference between all of the above cases and the issue at bar, is that here, there is no objection to a tax or to government expenditure.

(County Br., p. 15 (emphasis added; boldface by the County))

This is manifestly untrue. Plaintiff emphatically contends that "the use of

tax monies" and the "government expenditure[s]" here are unlawful. She marshals abundant evidence showing that Glacier County levies and expends taxes in violation of law. (App. Br., pp. 6-8)

The State also seeks to distinguish *Grossman* on grounds that demonstrably are untrue. It points to *Grossman*'s focus on the "constitutional validity" of government action. Then it states: "[P]laintiff does not challenge the constitutional validity of Glacier County's collection of taxes nor its use of funds." (State Br., pp. 30-31)

But Plaintiff does raise precisely that challenge! She argues that (1) Glacier County violates numerous laws in collecting and expending taxes, (2) the State enables those violations by not enforcing the SAA, and (3) those violations of law by the State and the County violate the constitutional guarantee of "strict accountability."

In sum, Plaintiff clearly has standing to bring this litigation. Both *Helena Parents* and *Grossman* are directly on point. The District Court clearly erred in dismissing Plaintiff's claims for lack of standing.

**D. "Private Right of Action" Analysis**

The State cites cases analyzing whether statutes grant "private rights of action." See *Mark Ibsen, Inc. v. Caring for Montanans, Inc*., 2016 MT 111, 383 Mont. 346, __ P.3d __, and *Wombold v. Associates Financial Services Co. of*

*Montana, Inc*., 2004 MT 397, 325 Mont. 290, 104 P.3d 1080. (State Br., pp. 24-26) It argues that this analysis bars private parties from bringing claims for violation of the SAA:

> [T]he SAA places sole discretionary enforcement powers with the State and does not provide for the recovery of attorney fees by a prevailing party. The SAA is simply not meant to be enforced by private individuals and the SAA does not supply individual rights sufficient to grant Plaintiffs standing for their claims against the State.

(Id., p. 26 (emphasis added))

This argument has no merit. The *Wombold*/*Ibsen* analysis does not apply. Those cases did not involve constitutional contentions, nor did they involve unlawful action by the State.

*Ibsen* sets out the following paradigm:

> We have addressed previously whether an individual claimant has the right to bring a private action to enforce a statute that primarily was intended to be regulated by a governing agency.
>
> * * *
>
> In [*Wombold*], … we first noted that [the statute in issue] did not expressly authorize a private right of action, nor did the legislative history indicate an intent to expressly grant or deny such a right. *Wombold*, ¶ 34. We then considered the following factors to determine if the statute implied such a right: (1) is the interpretation [allowing a private right of action] consistent with the statute as a whole; (2) does the interpretation reflect the intent of the legislature considering the statute's plain language; (3) is the interpretation reasonable so as to avoid absurd results; and (4) has the agency charged with the administration of the statute placed a construction on the statute.

*Ibsen*, ¶¶ 31-32 (emphasis added).

This paradigm clearly should not apply to claims like those in the present case. The issue is whether "the agency charged with administration of the statute" is itself in violation of the statute, and of the Constitution as well. The State should not be heard to contend that no one can bring such violations to the attention of this Court.

The ultimate issue here is justiciability, as shown above. This Court is responsible to vindicate the Constitution against abuses by the executive branch. The Court cannot carry out that constitutional role if private litigants cannot point out the abuse.

This Court addressed a very similar issue in *Grossman*. As in the present case, the State resisted a constitutional challenge on grounds that no private litigant could raise the claim. This Court asserted its own constitutional role, rejected a narrow reading of its jurisprudence, and allowed a taxpayer claim:

> It might be contended that a declaratory judgment action is not one for the issuance of a "writ." That contention would favor form over substance.
>
> * * *
>
> We should without hesitancy recognize this case for what it appears to be: a test case designed to obtain a final judgment on the validity of coal severance tax revenue bonds so that if valid, the bonds will be marketable. We will no longer be qualmish about jurisdiction in a bond issuance case. When the issues are fairly stated, fully explored, and vigorously contended, as they appear to be, we have here a

> justiciable controversy suitable for final resolution by this Court. Legal niceties must bend on occasion to the reality of the market. The living law moves with the times.

*Grossman*, 682 P.2d at 1323, 1326 (emphasis added).

Again, in *Columbia Falls*, this Court asserted its role as "the final guardian" of a constitutional right. *Columbia Falls*, at ¶¶ 18-19. It allowed a claim by private citizens to vindicate that right against abuses by the government. The Court performed no *Wombold* analysis.

In *Schoof v. Nesbit*, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, this Court once again upheld a private claim. It did so to vindicate "the overriding constitutional importance of transparency in local government." Id., ¶ 38. In order to vindicate that value, it adjusted doctrine, modifying holdings, which would have barred a private claim:

> We now conclude that, first, *Fleenor* misconstrued the nature of the 'injury" at issue in a right to know or right of participation case by requiring the plaintiff to allege an injury beyond failure to receive proper notice or to allege a personal stake in the particular governmental decision taken … We believe such requirements impose standing thresholds that are incompatible with the nature of the particular constitutional rights at issue.
>
> * * *
>
> While this three-part test [for equitable tolling] is appropriate in cases involving alternate legal remedies, the rationale behind the doctrine of equitable tolling serves broader purposes than merely those embodied in the test. … We cannot permit the constitutional right to know and right of participation to be abrogated by a failure to provide notice or adequate information, as alleged.

Id., ¶¶ 17, 34 (emphasis added).

*Schoof*'s mention of individual rights do not distinguish it. (See State Br., p. 23) Private litigants had standing in *Columbia Falls* and in *Goodman*, where the rights in issue were not expressly individual. In all three cases, private claims were essential for this Court to vindicate constitutional values pursuant to the separation of powers.

This Court should follow *Goodman*, *Schoof*, and *Columbia Falls* in vindicating constitutional values here. The Court should broadly apply justiciability doctrine in order to vindicate the separation of powers. It should hold that *Wombold*/*Ibsen* analysis does not apply to bar private claims of constitutional violations by the executive branch.

## II. THIS APPEAL IS NOT MOOT.

The County contends that this appeal is moot, because Plaintiff did not seek a stay of the order dismissing her action and did not post a supersedeas bond. (County Br., pp. 31-37) The County asserts that it has disbursed the tax dollars held in the protest fund. [1] It argues that this renders Plaintiff's injury "beyond a useful remedy," and thereby moots the appeal. (Id., p. 31)

[1] The Plaintiffs here have filed suit against Glacier County, its commissioners, and its treasurer for the unlawful liquidation of the tax protest fund. See, *Gottlob, Mitchell, et al v. DeRosier, Rides at the Door, McKay, Galbreath, and Glacier County,* Ninth Judicial District Court, Cause No. DV 17-19

This Court should reject the County's contention. The law does not require a stay or a supersedeas bond in this context. The escrowed money fulfills the role of a supersedeas bond.

The County improperly disbursed the fund. It can be ordered to replenish it, if Plaintiff prevails on the merits. Plaintiff's claims are not "beyond a useful remedy," and the appeal is not moot.

In the first place, Plaintiff's claims are not restricted to paying her taxes under protest. Plaintiff seeks declaratory judgment, and she can challenge the County's conduct whether she pays under protest or not. See *Grossman*, 682 P.2d at 1324-25. Her standing is based, in part, on the threat that the County's deficit spending will increase her tax burden in the future. See *Helena Parents*, 922 P.2d at 1143.

This case, accordingly, would not be mooted even if the tax protest claim required a stay pending appeal. But no such requirement exists. The County knew of Plaintiff's appeal (filed four days after the District Court's order), and it had no right to disburse the funds.

Section 15-1-402(4)(a), MCA, requires that taxes paid under protest must be placed in a "protest fund." The taxes must be retained in that fund "until the final determination of any action or suit" to recover them. Id.; see also § 15-1-402(6)(b), MCA. An action is not "finally determined" until this Court decides an

appeal.

This Court explained the intent of the protest fund in *First National Bank of Plains v. Sanders County*, 85 Mont. 450, 279 P. 247, 250 (1929). The Legislature recognized that if protested taxes were disbursed, and the taxpayer ultimately prevailed, "the general fund of the county was all too frequently in a state of exhaustion." See id. For that reason, "final determination" should be read to mean a final appellate determination ending all uncertainty.

The County's unlawful conduct in levying property taxes is unrebutted. It should not be allowed to evade appellate review by unlawfully disbursing the funds and declaring its violations "moot." See *Havre Daily News, LLC c. City of Havre*, 2006 MT 215, ¶¶ 38-39 ( "transparently manipulative" efforts to moot review will be rejected); *Kennedy v. Dawson*, 1999 MT 265, 296 Mont. 430, 989 P.2d 390 (Court rejects mootness argument, stating that it can fashion effective relief, where "all parties were cognizant of the contemplated appeal").

In sum, the Court should firmly reject the mootness argument. It should hold that Plaintiff has standing to pursue her claims and should remand for further proceedings. If Plaintiff's claims are upheld, the County can replenish the protest fund.

## CONCLUSION

Defendants argue that no one can bring constitutional violations to this

Court's attention. The Court has rejected similar arguments in *Helena Parents*, *Columbia Falls*, *Grossman*, and *Schoof*. It should reject those arguments here.

The underlying principle is this Court's role in vindicating constitutional values against violations by coordinate branches of government. Private litigants must be allowed to claim such violations if the Court is to sustain its role pursuant to the separation of powers.

The Court should find this matter justiciable and should hold that Plaintiff has standing. It should firmly reject the State's claim of unreviewable discretion. Plaintiff's claims should be ordered reinstated, and the case should be remanded for further proceedings in District Court.

Respectfully submitted this 22nd day of May 2017.

/s/Lawrence A. Anderson
Lawrence A. Anderson

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of one inch; and that the word count calculated by Microsoft Word does not exceed 4270 words, excluding the Table of Contents, Table of Authority, and Certificate of Compliance.

DATED this 22nd day of May 2017.

/s/Lawrence A. Anderson
Lawrence A. Anderson

## CERTIFICATE OF SERVICE

I, Lawrence A. Anderson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-22-2017:

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